



DEPARTMENT OF GENERAL SERVICES

Isiah Leggett
County Executive

David E. Dise
Director

September 13, 2013

VIA EMAIL and USPS

Mr. Bryant Foulger
Foulger-Pratt Contracting, LLC
9600 Blackwell Road, Suite 200
Rockville, Maryland 20850

Re: Silver Spring Transit Center

Dear Mr. Foulger:

We are in receipt of two separate letters from Foulger-Pratt Contracting, LLC ("FPC"), relating to remediation efforts at the Silver Spring Transit Center ("SSTC" or "Project"), each dated September 10, 2013. The first letter is under your signature to my attention and the second is sent from the FPC President to the Contract Administrator for the Project. I respond to both letters more fully below but in short, the County is simply not satisfied with the overall level of service that FPC has provided thus far on the Project and also with respect to the remediation efforts.

The County will hold FPC responsible for all costs associated with correcting defects in the Project caused by FPC. The County expects FPC as its general contractor to correct defective construction, continue to perform work on the Project and to do so in a diligent manner. FPC will not be paid for work which results from construction defects. Any delay that is caused by FPC's defective construction, and by FPC's failure to timely implement remediation efforts, will be assessed accordingly and those costs will be borne by FPC. Simply, FPC must provide the County and this Project the level of attention and effort required by the parties' contract. Nothing less will be accepted.

As to the specific letters, the first, sent under your signature to my attention addresses the County's impending directive to FPC regarding the use of a Latex Modified Concrete ("LMC") overlay as a means of remedying certain defective concrete slab conditions present at the Silver Spring Transit Center ("SSTC" or "Project"). A copy of that letter is enclosed for your reference as Exhibit A to this correspondence. The second letter was sent under the signature of John Barron, President of FPC, and directed to the attention of Ernest Lunsford, P.E., Contract Administrator for the Project. A copy of that letter is enclosed for reference as Exhibit B. The Exhibit B letter addresses, in part, the LMC overlay remediation as well as certain aspects of our August 26, 2013 meeting, which both you and I attended and included other representatives of the County, FPC, and Parsons Brinckerhoff, Inc., the Project Structural Engineer of Record, ("PB" or "SER"). Also in attendance at this meeting were Allyn Kilsheimer, P.E. and Charlie Russo, P.E., on behalf of the County and FPC respectively.

Office of the Director

101 Monroe Street, 9th Floor • Rockville, Maryland 20850

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Mr. Barron's letter, Exhibit B, correctly states that one of the subjects of the August 26 meeting was to discuss PB's position as to its recommendation for the LMC overlay to be placed over the drive aisles of the 330 and 350 levels of the SSTC. However, that letter fails to mention the reasons for this recommendation, namely the absence of appropriate concrete cover over post tensioning cables and reinforcing steel in the concrete slabs, thin slab conditions, and those areas in which FPC failed to pour concrete in conformance with the 10-inch minimum dimension required by the Contract Documents (collectively referred to as "defective slab conditions"). The defective slab conditions are present over a significant portion of the elevated concrete slabs. Mr. Barron's letter also unfortunately mischaracterizes certain statements made at the meeting and, therefore, fails to address the core issues behind the recommendation for the LMC overlay remediation alternative.

The LMC remediation alternative has been discussed, vetted, and addressed throughout the weeks of Cooperative Remediation Working Group ("CRWG") sessions. The result of this extensive analysis is that PB and the CRWG, except FPC and its subcontractors and consultants, have determined that the LMC overlay is appropriate and preferable in comparison with other alternatives, including the alternative proposed by FPC, as a means of remedying the defective slab conditions. As you are aware, FPC and its subcontractors and consultants have participated in all CRWG meetings and know that all alternatives, including the one proposed by FPC, were thoroughly reviewed and analyzed by all of the participants in the CRWG. Even as recently at yesterday's CRWG meeting, which FPC attended, participants were specifically asked to provide any alternative they considered to be superior to the LMC overlay. No comment was made in response to this request by those present.

Nothing contained in this letter is to be construed as ratification by the County of the necessity or feasibility of the LMC overlay, or any other alternative proposed for remediation of the thin slab and absence of adequate concrete cover prevalent in the Project. The County has the right to rely on PB and FPC to fix the defective conditions present in the Project. If PB provides a design for the LMC overlay as the technical solution for remediating the defective slab conditions and that solution is in the best interests of the Project, both in terms of practical application, time, and cost, then the County will accept PB's solution. The County of course, reserves the right to recover all added Project costs associated with that solution from the appropriate party or parties.

As is clear from the KCE Structural Evaluation of Superstructure Report of March 15, 2013, the County considers the responsibility for the defective slab conditions to be borne both by PB and FPC.

There will be reconciliation of the costs attendant to the ultimate remediation, and an appropriate allocation of that financial responsibility as between PB and FPC. However, such allocation must occur at a later date as it is imperative that the remediation continue with all appropriate speed and without further delay by either FPC or PB.

FPC has previously stated that it considers the LMC to be unnecessary and excessive in terms of cost, but at no point over the past months has FPC adequately identified a technical problem with the LMC solution that differentiates it from the FPC proposed solution. There is no dispute that there are difficulties associated with undertaking the application of an additional

1-5/8” to 2” thickness of cementitious material, as called for by PB, to an already existing drive surface.

As further described in this letter, FPC as the General Contractor, is obligated to advise the County of any perceived difficulties. Nonetheless, FPC has offered nothing to the County that supports your statements that the LMC remediation alternative is technically wrong, fails to address the existing deficiencies, or delays the opening of the SSTC any more than another remediation alternative would. Further, FPC has provided nothing to support your claim that this approach will “unnecessarily significantly increase the cost of the Project.” Therefore, the County is quite skeptical of such claims, especially as to vague “technical” problems with the LMC overlay remediation as voiced by FPC at this late date. Frankly, the County must seriously question FPC’s motives in this regard.

FPC’s proposed solution to correct the defective slab conditions, is limited to concrete patching over exposed post-tensioning ducts and rebar (caused by FPC’s failure to pour sufficient concrete), combined with the application of a silane sealer.

FPC’s silane solution is found to be wholly unacceptable by the County, the County’s independent engineering consultant, the Project SER, and WMATA. FPC’s solution neither addresses the thin slab conditions and the lack of adequate concrete cover, nor does it resolve the long-term durability issues related to the intended life span of the structure. Candidly, the County expected a better solution to be proposed by its General Contractor in this regard. The inadequacy of FPC’s proposed silane solution speaks to the failure on FPC’s part to conduct meaningful tests on the Project to determine the full extent of the defective slab condition, even after FPC was directed by the Contract Administrator to correct the defective slab conditions. Only the County, WMATA and the Maryland Transit Administration performed testing, at considerable expense, to determine the causes of the defective slab conditions.

If FPC believes that the LMC overlay remediation is incorrect for the Project from a technical perspective and, as Mr. Barron claims, that it will cause “more problems and complications than [the solution] purports to resolve”; it is incumbent upon FPC to state with specificity the basis for such concerns. As FPC is surely aware, Article 3(G) of its Contract with the County states that:

The Contractor has a continuing duty to read, examine, review, compare, and contrast each of the Contract Documents that make up this Contract, including Shop Drawings, and other Submittals, and must give written notice to the Owner and the Architect of any conflict, ambiguity, error, or omission which the Contractor may find with respect to the Contract Documents, the Shop Drawings, and other Submittals that come to the attention of Contractor during the course of the Work and before proceeding with any part of the Work affected by the conflict, ambiguity, error, or omission. The express or implied approval by the Owner or the Architect of any Shop Drawings or other Submittals does not relieve the Contractor of the continuing duties imposed by this Contract, nor is any such approval evidence of the Contractor's compliance with this Contract....The Contractor again acknowledges and represents that it has received, reviewed, and carefully examined all of the Contract Documents, has found them to be complete, accurate, adequate, consistent, coordinated, and sufficient for construction of the Work for the Project, and that the Contractor has not, does not, and will not rely upon any

representations or warranties by the Owner concerning the Contract Documents, as no such representations or warranties have been or are made by the Owner.

Article 3(G) of FPC's Contract provides that if FPC sees something it believes constitutes a technical problem with the Project, FPC must bring that specific issue to the attention of the County, in writing. This same obligation is reiterated in the General Conditions of Construction Contract (GCCC), at Section 5.1.6:

5.1.6 Notice of Errors. The Contractor must promptly notify the Owner and the Architect/Engineer in writing of any apparent errors, inconsistencies, omissions, ambiguities, construction impracticalities or code violations discovered as a result of the Contractor's review of the Contract Documents including any differences between actual and indicated dimensions, locations and descriptions, and must give the Owner and the Architect/Engineer timely notice in writing of same and of any corrections, clarifications, additional Drawings or Specifications, or other information required to define the Work in greater detail or to permit the proper progress of the Work. The Contractor must provide similar notice with respect to any variance between its review of the Site and physical data and Site conditions observed.

Of similar concern to the County is the position FPC is now taking with respect to the thin slab and absence of adequate concrete cover issues. Namely, FPC now appears to contend that such conditions are the result of a design deficiency on the part of PB and that it was essentially impossible for FPC to construct the elevated concrete slabs with sufficient concrete cover over the PT cable and reinforcing steel. If FPC believed during the construction of the Project that the design was flawed it was required, as noted above, to document in writing those concerns to the County and the SER. Further, if FPC believed during the construction of the Project that the design was flawed, its continued performance on the Project is irresponsible and inconsistent with the requirements of the Contract Documents. Specifically, Article 9(A) of the Contract, and GCCC 5.1.7 provide that:

[i]f the Contractor performs Work knowing or believing it involves an error, inconsistency or omission in the Contract, without first providing written notice to the Architect and Owner, the Contractor is responsible for the Work and must pay all costs of correcting it.

...

5.1.7 Risk of Performance. If the Contractor performs any Work involving an apparent error, inconsistency, ambiguity, construction impracticality, omission or code violation in the Contract Documents of which the Contractor is aware, or which could reasonably have been discovered by the review required by Subsections 5.1.1 through 5.1.4 without prompt written notice to the Owner and the Architect/Engineer and request for correction, clarification or additional information, as appropriate, the Contractor does so at its own risk and expense **and all claims relating thereafter are specifically waived.**

Therefore, had FPC knowingly performed any Work on the Project in light of such deficiencies, the County will hold FPC responsible.

Additionally, as FPC is aware, in accordance with Article 10.6 of the GCCC, the County has previously rejected the non-conforming Work in the elevated concrete slabs on levels 330

and 350. Direction from the County to FPC as to correcting the defective conditions, either in the past or going forward, has been and will be given in accordance with Section 10.6.2 of the GCCCs and the County fully expects that any costs, and time, attendant to correcting such conditions are and will be the responsibility of FPC. The County has already made payment for work since determined to be defective. Therefore, all costs incurred to correct defective conditions must be borne by the responsible parties.

As to your contention that FPC is somehow entitled to monies from the County for the Work associated with the LMC overlay remediation, if this is ultimately determined to be correct, the County would seek payment from other parties determined responsible for the necessity of the Work.

As I've mentioned to you numerous times, FPC will be paid for properly executed Work performed under its Contract with the County. Unfortunately, certain FPC Work on the Project is lacking in quality and does not conform to the Contract Documents. As such, the County has every right and responsibility to County residents and taxpayers to protect its interests in this regard.

As you are aware, Article 7(F) of FPC's contract and Section 13.4.4 of the GCCCs provide, respectively:

(F) The Owner has the right to refuse to make payment and, if necessary, may demand the return of a portion or the entire amount previously paid to the Contractor due to any reason stated in Article 13 of the General Conditions of Construction Contract. The Contractor must immediately comply with any written demand by the Owner for repayment or reimbursement of the Owner for any amounts previously paid by the Owner as contemplated in this Article.

...

13.4.4 Payment Contingent on Performance. Progress payments may be withheld if the Contractor is not in full compliance with the Contract. The Owner's failure to make progress payments is not an event of default by the Owner under the Contract, nor does it give rise to the right of the Contractor to stop work.

Given the construction deficiencies present in the Project, as noted in the KCE Report, the County is well within its contractual rights to retain payment, or demand return of monies already paid to FPC for the defective Work. You may consider this letter notice that the County will consider either alternative, as necessary, given the status of the Project.

Note also, that FPC must still continue to diligently pursue the Work on the Project regardless of the County's stance on payment. As required by Section 13.4.4 (cited above) and Article 7(G) of the Contract, the Contractor cannot stop work. Therefore, the County expects FPC to diligently prosecute the remediation Work. The County will also hold FPC responsible for any delay in the Work.

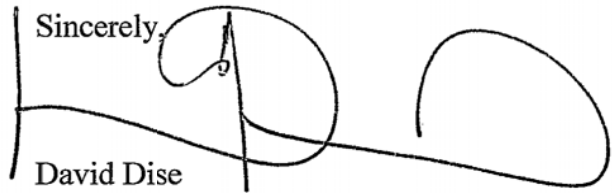
This Project is grossly behind schedule. As you are aware the Contract allows the County to assess against FPC the agreed upon liquidated damages amount of Eight Thousand Nine Hundred dollars (\$8,900.00) per day for each day the Project continues beyond the contractual

date of Substantial Completion. Therefore, FPC is responsible for liquidated damages to the extent delay is caused by FPC.

Your letter labels as “completely disingenuous” alleged statements by the County that the PB overlay approach will take “a mere” six weeks to complete. If this statement refers to my memorandum of September 5, 2013 providing a progress update on remediation of defects in the SSTC, let me accurately quote that memo, “[b]ased on the subcontractor’s early estimates, it will take 6 weeks to prepare the surface and lay down the overlay.” There may have been some misunderstanding of the subcontractor’s earlier comments to the CRWG and we now understand this to be the period for the application of just the LMC overlay. We know, and I pointed out to the County Council in my September 10th briefing, that surface preparation and sealing of cracks must precede overlay application. However, we now know that based on WMATA comments adjustments to curb heights and other related work is unlikely, which will shorten the work schedule you projected. Nevertheless, the draft progress schedules thus far submitted by FPC to the CRWG demonstrate a total lack of interest in prosecuting this work with any urgency.

Finally, Mr. Barron’s letter makes a number of assertions as to statements made by County representatives and Mr. Kilsheimer at the August 26, 2013 meeting. FPC’s characterization of these statements, on the whole, is simply incorrect and does not reflect what transpired at that meeting.

Please direct any further communication relating to this matter or the Project, in writing, directed to me or the Contract Administrator.

Sincerely,

David Dise
Director

cc: Isiah Leggett, County Executive
Nancy Navarro, Council President
Montgomery County Council
Tim Firestine, Chief Administrative Officer
John Markovs, Deputy County Attorney
Ernie Lunsford, Chief, DGS Building Design & Construction
John Barron, President, Foulger-Pratt Contracting, LLC



WE BUILD TO LAST

September 10, 2013

VIA EMAIL

Mr. David Dise
Director
Department of General Services
Montgomery County Government
101 Monroe Street, 11th Floor
Rockville, MD 20850

**Re: Silver Spring Transit Center- FPC Job No. 51-0037 (The
"Project")**

Contract No. 7504510123-AA

Dear Mr. Dise:

I am compelled to express Foulger-Pratt Contracting, LLC's ("FPC") material concerns with various public statements recently made by Montgomery County officials relating to the Silver Spring Transit Center Project ("Project") and particularly the County's impending directive to FPC to install a Latex Modified Concrete ("LMC") overlay on the 330 and 350 levels of the Project.

First, the clear impression given by the County statements is that FPC supports and agrees that the LMC overlay approach is the proper approach to be implemented to address the County's concerns; which concerns relate primarily to the cracking of slabs and the amount of concrete cover over PT ducts, both of which result from a defective design. This impression is not correct - as you well know. To the contrary, the subject of the LMC overlay and various alternative approaches recommended by FPC, our engineering consultant Simpson, Gumpertz and Heger ("SGH"), and Facchina Construction Company ("Facchina") have been discussed weekly for over eighteen weeks at the CRWG meetings which we have attended and which have been conducted by KCE Structural Engineers. As you, your staff, and the County's outside consultants are well aware, FPC, Facchina and SGH have repeatedly advised against installation of the LMC overlay being insisted upon by the County's design professional, Parsons Brinckerhoff ("PB"). We, Facchina and SGH have objected to the LMC overlay because it (1) is technically the wrong approach for the Project because, *inter alia*, it fails to address

the underlying design issues causing the concrete cracking and long-term maintenance of the cracking slabs; (ii) is inconsistent with the Contract Documents; (iii) will in all likelihood delay the opening of the SSTC at least until the summer of 2014; and (iv) will unnecessarily significantly increase the cost of the Project to the County. As you further know, we have recommended other approaches that are technically far superior and which would not present the delays to the opening of the SSTC and cost increases to the County inherent in PB's approach. While we will of course proceed (under protest and with a full reservation of rights) with the directive that the County provides, and while we will expedite the work as much as possible, we are concerned by the erroneous impression left by the County's statements to the effect that we support the County's decision.

Second, we are concerned that the County's statements that the LMC overlay work will take FPC and Facchina only six weeks to complete are rather misleading. On June 22, 2012, FPC submitted, at the County's direction, a Conceptual Program Submittal for an LMC that included a rough schedule for completing all of the then-anticipated activities associated with the LMC. One such contemplated activity -- the installation of the LMC -- was estimated to require a six week period to complete. At a recent CRWG meeting, FPC presented another very rough schedule estimate, which again included numerous activities, one of which was installation of the LMC which was again estimated to require six weeks. It is completely disingenuous to state that the PB overlay approach will take a mere six weeks to complete when the rough estimates provided clearly indicate that the installation activity alone will require six weeks to complete and that numerous other activities are required. And, it is especially disingenuous to rely on these estimates, which are based only on a conceptual program, given that there is still no completed, definitive design and scope of work. To the contrary, we have repeatedly expressed our concern that a direction to install an LMC overlay will likely delay the opening of the SSTC until at least the summer of 2014.

We have pointed out on several occasions that there are a number of important factors that affect the time frame for completion of such work, including but not limited to: (a) design of such work has not yet been completed or fully coordinated amongst the various design disciplines by the County's design consultants; (b) WMATA has not yet commented on and/or approved the design package; (c) the County has not yet made any permit submissions, yet issuance of permits is

necessary for commencement of the work; (d) there will necessarily be a number of submittals, approvals, and mock-ups required to be completed before Work can begin; (e) there will necessarily be time requirements for the procurement of materials before Work can begin; and (f) there are significant physical work elements that must be completed prior to the commencement of the LMC installation.¹ These and other similar factors make clear that any LMC Work that is directed cannot be commenced in the very near time frame. Moreover, given these factors and the temperature restraints inherent in the LMC materials, it is very likely that this Work will not be completed before the summer of 2014. Indeed, the County's preferred LMC overlay subcontractor specifically stated at last week's CRWG meeting that the LMC overlay selected by PB has cold weather restrictions that do not allow for its installation during the months of November through April. As a result, we are very concerned by the wrong impression created by the County's statements with regard to the time frame for the completion of this Work and the opening of the SSTC.

Lastly, we are concerned with the County's statements that the implementation of PB's LMC overlay design will not cost the County anything. As we have discussed and as the County has acknowledged, any County directive to FPC to proceed with the LMC overlay as designed by PB is materially inconsistent with PB's original design and the Contract Documents and will constitute a significant and costly change to our Contract with the County. While FPC intends to proceed with the work as directed by the County, FPC is clearly entitled to be paid for this changed work regardless of whether or not the County recovers such added expense from PB.

Sincerely,
FOULGER-PRATT CONTRACTING,
LLC



Bryant Foulger

¹ FPC's current understanding, based upon the preliminary design provided by PB (which is still incomplete and is not yet wholly coordinated), is that, among other things, demolition of handicap ramps, crack repair, addition of waterproofing at handicap ramps, replacement of handicap ramps, and procurement and installation of drain extension frames for curb inlet drains, all must be completed prior to the commencement of the overlay work. The County has been fully advised of these requirements at recent CRWG meetings.

Mr. David Dise
Montgomery County Government
September 10, 2013
Page 4

Principal

CC: Ernest Lunsford - MCG
Don Scheuerman - MCG
Frank Roberts, P.E. - MCG
John Markovs, Esquire - MCG
Bryant Foulger - FPC
Clayton Foulger - FPC
Mick Doolittle - FPC
Brent Pratt - FPC
David Uffelman - FPC
Scott Vossler - FPC
Brett Harton - FPC



FOULGER-PRATT

WE BUILD TO LAST

September 10, 2013

VIA EMAIL

Mr. Ernest Lunsford, P.E.
Contract Administrator
Department of General Services
Montgomery County Government
101 Monroe Street, 11th Floor
Rockville, MD 20850

**Re: Silver Spring Transit Center- FPC Job No. 51-0037 (The
"Project")**

Contract No. 7504510123-AA

Dear Mr. Lunsford:

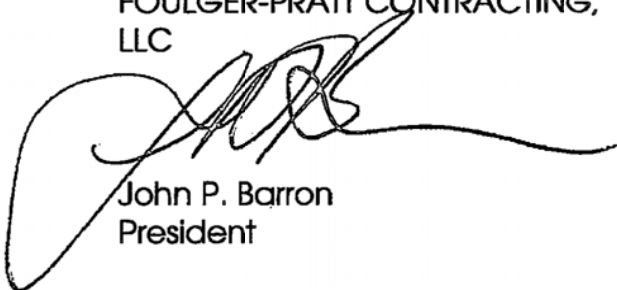
I am writing with regard to the meeting held on August 26, 2013 in your offices at which representatives (including counsel) of the County, Foulger-Pratt Contracting, LLC (FPC), Parsons Brinckerhoff (PB) and Allyn Kilsheimer, P.E. and Charlie Russo, P.E. were present. The purpose of the meeting was for the County to address its concerns with the position taken by PB regarding PB's insistence that a Latex Modified Concrete overlay of 1 and 5/8 inches be placed on the totality of the 330 and 350 levels of the SSTC (the "Overlay Work").

At this meeting Mr. Kilsheimer, on behalf of the County, made a PowerPoint presentation which took material issue with the propriety of PB's position and stated that (i) PB's insistence on the Overlay Work was inconsistent with the requirements of the Contract Documents and (ii) constituted extra and changed Work under FPC's Contract with the County. Nonetheless, the County stated that given PB's role as Engineer of Record the County "had no choice" but to direct FPC to perform the Overlay Work per PB's position. When asked by FPC whether the County would issue a change order and pay FPC for the performance of this admittedly changed and extra Work, Mr. Dise stated that the County would not because the County "did not have any money." Rather the County representatives stated that the County would advise PB that it regarded the Overlay Work being insisted upon by PB as clearly constituting extra and changed Work for which the County would make a claim against PB.

As we stated clearly during the August 26 meeting and subsequently in various phone conversations and at the August 29 CRWG meeting:

1. PB's stated position is, both technically and construction-wise, the wrong approach for the Project. It will unnecessarily and dramatically increase for the County the cost of the Project and substantially delay the opening of the SSTC. We strenuously object to any directive that requires FPC to perform the Overlay Work and will vigorously pursue reimbursement for all costs, damages and delays incurred.
2. If the County does indeed move forward to direct the Overlay Work in accordance with PB's approach, be advised that FPC is not obligated to and will not perform any design type services, including detailing of PB's design concepts. As we have stated many times, PB's approach causes significantly more problems and complications than it purports to resolve and FPC cannot and will not be put in a position where it is at-risk for a design concept and changed Work which is fundamentally flawed. Therefore, it will be incumbent on the County to deliver to FPC, with any directive, a **complete and fully coordinated** set of revised Contract Documents and FPC will not proceed until it has received such Contract Documents and all required permits relating to the new design.
3. The County's clear statement that the PB approach is inconsistent with the Contract Documents and will require the performance of extra Work and its refusal to issue a change order and pay FPC for the extra Work are irreconcilable. The County's position is a clear material breach of the Contract. FPC will vigorously pursue its rights and remedies for this material breach.

Sincerely,
FOULGER-PRATT CONTRACTING,
LLC



John P. Barron
President

CC: David Dise - MCG
Don Scheuerman - MCG
Frank Roberts, P.E. - MCG

John Markovs, Esquire – MCG
Bryant Foulger – FPC
Clayton Foulger – FPC
Mick Doolittle – FPC
Brent Pratt – FPC
David Uffelman – FPC
Scott Vossler – FPC
Brett Harton – FPC